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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: United Segurança, Ltda.

File: B-294388

Date: October 21, 2004

Dr. Rafael Lycurgo Leite for the protester.

David B. Dempsey, Esq., Kristen E. Ittig, Esq., and Anand V. Ramana, Esq., Holland & Knight, for Wackenhut International, Inc., an intervenor.

Dennis J. Gallagher, Esq., Department of State, for the agency.

Jonathan L. Kang, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly awarded a contract to a joint venture that protester alleges may not be allowed to perform the contract under Brazilian law is denied where local licenses were not required prior to award and thus the question of the awardee's ability to perform the contract concerns the awardee's responsibility. The Government Accountability Office does not review an agency's affirmative determination of responsibility absent the applicability of exceptions not alleged here.

2. Protest that agency failed to allow proposal revisions based on changes to the incumbent contract is denied where the agency did not incorporate those changes into the current solicitation.

DECISION

United Segurança, Ltda. (USL), protests the award of a contract under request for proposals (RFP) No. S-BT250-02-R-0008, issued by the Department of State to a joint venture of Wackenhut International, Inc. and Graber Sistemas de Segurança (WII-Graber) for security services at United States (U.S.) Embassy buildings in Brazil. USL challenges the agency's award to WII-Graber on grounds that the awardee is prohibited under Brazilian law from performing the contract and that the agency improperly declined to allow offerors to submit revised proposals in response to a change in the incumbent contract's staffing levels.

We deny the protest.

The RFP was issued on June 3, 2003, and contemplated the award of a time-and-materials contract for security services in Brazil, at the U.S. Embassy in Brasilia and consulate buildings in Recife, Rio de Janeiro, and São Paulo. The RFP stated that award would be made to the responsible offeror submitting a technically acceptable proposal and offering the lowest evaluated price. RFP § M.1. The RFP included a 10-percent price evaluation preference for “U.S. persons,” in accordance with the requirements of Section 136 of the Foreign Relations Authorization Act for Fiscal Years 1990 and 1991, Public Law 101-246, 22 U.S.C. 4864, as amended. To receive the price evaluation preference, an offeror must qualify as a “U.S. person”; a joint venture qualifies as a U.S. person if at least 51 percent of its assets are owned by the joint venture’s U.S. partner(s). RFP §§ K.11, M.4.

WII-Graber is a joint venture of Wackenhut, a U.S.-owned company, and Graber, a Brazilian-owned company. Agency Report (AR), Tab 12, WII-Graber Proposal, at 20. The WII-Graber proposal identified itself as a “U.S. person” based on WII’s ownership of 51 percent of the joint venture’s assets. Id. USL is a Brazilian-owned company. AR, Tab 6, USL Proposal, at 7. The proposals of both WII and USL were found technically acceptable. AR, Tab 21, Price Negotiation Memorandum, at 2-4. WII-Graber received the 10-percent price evaluation preference and, as a result, was the low-priced offeror. WII-Graber was, therefore, selected for award as the responsible offeror submitting the low-priced, technically acceptable proposal. Id. at 4-6.

USL first protests that Brazilian law prohibits non-Brazilian ownership or operation of a business entity that provides security services, thus rendering award to WII-Graber improper. USL argues that there is an inherent contradiction between the RFP price evaluation preference, which requires majority ownership by a U.S. company, and what it contends is the Brazilian prohibition on non-Brazilian majority ownership and/or control of a security company.

The agency disagrees with USL’s assertion that Brazilian law prohibits WII-Graber’s performance of the contract requirements. Further, the agency notes that offerors were not required to demonstrate in their proposals that they currently possessed the Brazilian licenses and permits needed to perform the work under contract. Rather, the RFP specified the following regarding permits:

The Contractor shall obtain all permits, licenses and appointments required for the prosecution of work under this contract at no additional cost to the government. The Contractor shall obtain these permits, licenses, and appointments in compliance with host country laws The Contractor shall provide evidence of possession or status of application for such permits, licenses, and appointment to the

Contracting Officer with his approval. Failure to be fully licensed by date planned for commencement of contract performance may result in contract termination.

RFP § H.7.6.

The RFP further required that offerors identify all licenses and permits currently in their possession and indicate what other licenses and permits would be obtained and when. RFP § L.1.1.3(c)(2). Following award, the contractor is required to “complete the steps necessary to obtain all required licenses, permits, and insurance,” after which the government will issue a notice to proceed. RFP § F.5.1-5.2.

There is no dispute that WII-Graber at the time of evaluation was entitled to the “U.S. person” preference. While USL alleges that WII-Graber will not be permitted to perform the work under Brazilian law because it is a foreign-owned firm, USL has not provided any evidence supporting its position.¹ The agency notes that USL itself performed the incumbent contract for several years as a similar American-Brazilian joint venture, prior to USL assuming sole responsibility for the contract. Memorandum of Law at 14-15. USL does not dispute these facts, but argues that its prior performance was not proper under Brazilian law and that WII-Graber’s performance would be similarly improper. Protester’s Comments at 2. In any event, we agree with the agency that the determination of whether WII-Graber will be able to obtain authorization under Brazilian law to perform the work is not a matter for our review.

In this regard, the record shows that the contracting personnel requested and relied upon a legal opinion from its Office of General Counsel, which found that “[although] it is your understanding that Brazilian law prohibits foreign firms from operating security services . . . [i]n the context of our solicitation, this would be a matter to be considered at the [time] of award in determining offeror responsibility.” AR, Tab 16, Legal Memorandum Addressing U.S. Person Preference, at 5. In making his responsibility determination, the contracting officer was aware of at least three specific licenses and permits required for the performance of security guard services: “Authorization for Performance of Services,” “Security Certificate,” and “Authorization for Guns.” AR, Tab 17, Pre-Negotiation Memorandum, at 1. The

¹ In its comments on the agency report, USL states that it does not dispute that WII-Graber will be able to obtain the necessary licenses and permits; instead, USL continues to argue that Brazilian law prohibits the formation of a company that provides security services and is owned or controlled by a non-Brazilian entity. Protester’s Comments at 2. Regardless of USL’s characterization of its protest, we agree with the agency that the operative question in this procurement (albeit not one for our review) will be whether WII-Graber obtains the necessary licenses and permits from the Brazilian authorities.

contracting officer found WII-Graber responsible for purposes of award, concluding that the firm was “eligible to receive an award under applicable laws and regulations,” and noting that the agency would “pay special attention to the transition plan in order to coordinate the timeframe for Wackenhut’s securing licenses and permits with the phase-out of the current contract.” AR, Tab 21, Price Negotiation Memorandum, at 6.

A general solicitation provision of the type included here that requires the contractor to obtain all necessary licenses or permits needed to perform the work does not require that a bidder or offeror demonstrate compliance prior to award. Mid-America Mgmt. Servs., Inc., B-244103, June 5, 1991, 91-1 CPD ¶ 537 at 1-2. Instead, the securing of licenses and permits is a performance requirement that may be satisfied during contract performance and does not affect the award decision except as a general responsibility matter. HAP Constr., Inc., B-278515, Feb. 9, 1998, 98-1 CPD ¶ 48 at 2-3. Our Bid Protest Regulations generally preclude our review of a contracting officer’s affirmative determination of an offeror’s responsibility, absent the applicability of exceptions not alleged here. Bid Protest Regulations, 4 C.F.R. § 21.5(c) (2004). We presume that the Brazilian authorities will, pursuant to Brazilian law, determine whether WII-Graber is legally eligible to receive the licenses and permits needed to perform the contract. Therefore, the issue of whether WII-Graber ultimately obtains the licenses and permits is a matter of contract administration, which our Office does not review. See 4 C.F.R. § 21.5(a); Mark Dunning Indus., Inc., B-258373, Dec. 7, 1994, 94-2 CPD ¶ 226 at 5-6. On this record, we conclude that there is no basis to disturb the agency’s responsibility determination or its award to WII-Graber.

USL next argues that the solicitation failed to reflect a decrease in the staffing levels required under its incumbent contract and that offerors were not allowed to revise their proposals to respond to this change.

The record shows that on June 1, 2004, the incumbent contract was modified to reduce staffing levels in response to a short-term budgetary emergency. Memorandum of Law at 18-19. The agency, however, did not incorporate this change in requirements into the RFP because the solicitation, which called for higher staffing levels, accurately represented the agency’s current needs. To the extent that USL is arguing that its performance under the incumbent contract’s downward staffing revision reflected a change in the government’s actual needs that should have been incorporated into the solicitation, such a protest is untimely as it is effectively a challenge to the solicitation terms that was not raised prior to the time

for receipt of proposals. 4 C.F.R. § 21.2(a)(1). In any event, we point out that USL has not otherwise shown that the agency's current staffing needs are not reasonably reflected in the RFP.

The protest is denied.²

Anthony H. Gamboa
General Counsel

² USL also alleged in its protest that the awardee improperly proposed to hire the protester's incumbent key personnel. Protest at 14. Although the agency responded to this issue in the agency report, the protester did not address the agency's position in its comments. We therefore dismiss this protest ground as abandoned. See 4 C.F.R. § 21.3(i); SDS Int'l, B-285821, Sept. 21, 2000, 2000 CPD ¶ 162 at 3.